OCTOBER TERM, 1950

No. 177

JOHN F. HARTMANN ET AL., PETITIONERS

vs.

JOHN C. LONG ET AL., RESPONDENTS

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

JOHN F. HARTMAIER ET AL., PETITIONERS,

VS.

JOHN C. LONG ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION No. 2.

(Numbers in Parentheses Refer to Pages of Certified Copy of the Record.)

John F. Hartmaier, for himself and on behalf of one hundred and thirteen petitioners similarly situated, respectfully petitions this Court for its writ of certiorari to review the final judgment of the Supreme Court of Missouri, Division No. 2, entered in the above captioned cause, wherein said Court did affirm the judgment of Division No. 8 of the Circuit Court of Jackson County, Missouri, at Kansas City.

Petitioners seek a writ of certiorari because the judgment of the trial court above referred to, and the judgment of the Supreme Court of Missouri, Division No. 2, erroneously interpreted and construed the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. 201, *et seq.*, as amended, and the judgment of the Supreme Court of Missouri completely ignores and is in conflict with applicable Federal cases from the various courts of appeal of the United States, and is likewise in conflict with controlling decisions of this Court.

A question of public interest is involved in the matter at bar, to some degree in all jurisdictions and in Missouri to a great extent. Our reason for this statement is because actions for unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended, may be maintained in either Federal or state courts (29 U. S. C. A. 216(b)). The decision of the Supreme Court of Missouri, Division No. 2, herein is the first decision of that Court involving the broad, general principles of the Fair Labor Standards Act. If the instant decision is permitted to stand, ignoring as it does the Federal and Supreme Court decisions interpreting the Act, it will completely negative the intent of the Act so far as the state courts of the State of Missouri are concerned, since those courts are bound to follow the decisions of the Supreme Court of Missouri, 1945 Constitution of Missouri, Article V, Section 2.

Your petitioners, having exhausted their remedies below, now seek a writ of certiorari from this Court to correct the decision of the Supreme Court of Missouri. as aforesaid.

JURISDICTION.

This Court has jurisdiction herein by virtue of 28 U. S. C. A., Section 1257 (3), in that the Supreme Court of Missouri, Division No. 2, is a court of last resort within the meaning of said section, 1945 Missouri Constitution, Article V, Section 2. The Supreme Court of Missouri may, and does sit in two divisions, 1945 Constitution of Missouri, Article V, Section 7, and divisional opinions are final unless application is made and sustained to transfer the cause to the Supreme Court *en banc,* 1945 Constitution of Missouri, Article V, Section 9.

In the instant case Division No. 2 rendered its opinion on the 12th day of March, 1951 (1098) and did enter judgment against appellants (petitioners herein) (1097). Thereafter, appellants (petitioners herein) filed their separate motions for rehearing (1116) and to transfer this cause to the Supreme Court of Missouri *en banc,* because a Federal question is involved (1129), as provided by 1945 Constitution of Missouri, Article V, Section 9. Thereafter, said motions were overruled by Division No. 2 of the Supreme Court of Missouri (1131). There being no further remedy open to petitioners in the Supreme Court of Missouri, your petitioners now pray this Court for its writ of certiorari to review the judgment of the Missouri Supreme Court, Division No. 2.

Petitioners are in time, since the judgment of the Supreme Court became final upon the overruling of the separate motions for rehearing and to transfer the cause to the Court *en banc* on the 9th day of April, 1951 (1131). Within ninety days therefrom petitioners present their petition herein.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

This is a case in which 114 petitioners seek to recover unpaid overtime wages, liquidated damages and reasonable attorneys' fees under the terms and provisions of the Fair Labor Standards Act of 1938, as amended. In brief, it is petitioners' claim that they worked 48 or more hours per week with no overtime compensation for time worked in excess of 40 hours.

The facts are practically undisputed. Plaintiffs (petitioners herein) in the trial court accepted and conceded defendants' records as to time worked, and rate of pay. There is no so-called Portal-to-Portal issue in this cause. Defendants produced only one witness. The testimony adduced on behalf of plaintiffs fills two and one-half volumes of the record.

The plaintiffs-petitioners are 114 men and women who were employed in the building of a wartime installation for the production of aircraft engines in Jackson County, Missouri, during World War II, the installation being known as the "Pratt & Whitney Plant." All of the petitioners herein were employees of defendants, the defendants being referred to by both sides throughout the record as "Long-Turner." Most of the employees commenced work in the summer of 1942 and worked until 1943.

Defendants Long-Turner were employed to construct an airplane engine works in Jackson County, Missouri, for the use of the Pratt & Whitney Aircraft Corporation of Missouri (957).

While defendants were engaged in building the plant and the plaintiff employees herein were so employed, the building was constructed in sections (413), and as one sec-

tion was finished, it would be turned over by the defendants to the Pratt & Whitney Aircraft Corporation (413).

After February 1, 1943, Pratt & Whitney's manufacturing machinery was in place (459), which machinery was for the purpose of manufacturing engines, which the trial court found to have been produced for commerce and subsequently shipped outside the State of Missouri (1055).

Generally speaking, the employees were divided into the following groups: (a) surveyors; (b) firemen; (c) guards;. (d) waterboys and (e) miscellaneous employees.

The surveyors were hired for six days a week and eight hours a day (263-309-329). They laid out roads (263) and railroad sidings (263). The sidings which they worked on and laid out were joined to the main line of the Missouri Pacific Railroad (267) and this line of the Missouri Pacific ran outside the state of Missouri (275). The spurs, or tracks, which they laid were first laid on a temporary basis (303) but as soon as they were laid cars from the outside ran over them (268-269-334).

It took approximately thirty days from August 3, 1942, to get the spur line in operation, after which time it was in constant use (272). The surveyors spent substantial parts of their time working on rail sidings, highways, power plants, unloading docks and cuts for the railway spurs (278-279-331-343). Freight cars moving over the spurs which they laid carried material for defendants Long-Turner and machinery for Pratt & Whitney (324). The evidence of the surveyors showed that without exception in the months following August 3, 1942, a substantial portion of each and every work week was devoted to the aforesaid instrumentalities of interstate commerce (279-280-331).

The firemen, and all of them, patrolled the entire area to look for fires and to extinguish them wherever found (358). They patrolled the warehouse area (363) in which was stored lumber and other building materials, electrical equipment and all of the necessary material required in the construction of the plant (363). They patrolled the area (363) in which fuel, including oil cars for inflammable petroleum products, were stored (363). It was their duty to protect from fire the box cars and their contents located on the sidings which had been constructed (366). Various materials were stored in these box cars (366) which were guarded by plaintiff firemen. They protected the lumber yards (468) in which were stored 30 to 35 per cent of the lumber which was shipped into the plant pending its final use, and all of the lumber came from outside Missouri (464-465). It was the duty of the firemen to respond wherever they were needed (367-368). Various materials in substantial quantities were stored in boxcars on the sidings pending unloading, which were protected by the firemen (368-369-467-527). The manifests indicated the material came from without Missouri (521). While the firemen were performing their duties for Long-Turner, they were also protecting the operations of Pratt & Whitney Aircraft Corporation after Pratt & Whitney was engaged in manufacturing operations subsequent to February 1, 1943 (632). Pratt & Whitney finally established a fire department (461) but for several months plaintiff firemen and the firemen of Pratt & Whitney worked side by side and protected the same property (460-461). The firemen were hired on a basis of six days a week and eight hours per day (417) and whenever a fireman was absent for a day he was docked (481).

Plaintiff guards checked personnel badges and machinery coming into the area (515), watched for sabotage

(520). It was part of their duties to guard bulldozers and machinery which had been cleaned and were waiting for shipment by railroad out of the area (545). They guarded the warehouses and boxcars which had not been unloaded (551-552). Like the firemen, they responded, wherever their services were needed and they guarded not only material under control of Long-Turner, but materials under the control of Pratt & Whitney as well (528). They were employed on an eight hour-six day per week basis (514-1054) and were docked when they missed a day.

The water boys carried water to workmen within the area (438). They were on duty to supply water to all of the workmen who asked for it, including Pratt & Whitney employees (443-708-795). Whenever they missed a day they were docked (443).

There were certain miscellaneous employees with whose duties we will not burden the Court at this time. Sufficient it is to say that their services contributed to the production of goods for commerce within the meaning of the Fair Labor Sandards Act of 1938, as amended, as interpreted by the decisions of the various Courts of Appeal as well as the decisions of this Court.

QUESTIONS PRESENTED.

The questions presented and which petitioners say were erroneously decided and determined by the Supreme Court of Missouri, Division No. 2, hinged on the following general propositions which were affirmatively urged by plaintiff petitioners:

I.

Petitioners firemen and guards were covered by the Fair Labor Standards Act because the protective

activities of the firemen and guards were so closely related to incoming interstate shipments as to be a part thereof.

II.

Plaintiff firemen, guards and waterboys after February 1, 1943 (the date on which machinery for Pratt & Whitney operation arrived and was set up), were rendering such necessary and essential services as to constitute "production of goods" and thus they were protected by the Act. Moreover, plaintiff firemen and guards were still covered under Point I, *supra,* because the protective duties of the firemen and guards were still so closely related to incoming interstate shipments as to be a part thereof.

III.

The surveyors were covered by the Fair Labor Standards Act for the reason that when they were engaged in laying out and moving railroad tracks and spurs over which interstate commerce flowed from the time the tracks were first temporarily laid, they were working up and reconstructing instrumentalities of interstate commerce.

BRIEF.

FOREWORD.

We anticipate that respondents will argue petitioners were not covered by the Act because the work consisted of new construction.

In most cases of new construction, this position would be correct. In the instant case, those petitioners who were guards or firemen are covered by the Fair Labor Standards Act because (1) their work was so closely related to incoming interstate shipments as to be a part thereof; or (2) because the protective nature of their duties with respect to the manufacturing operations of Pratt & Whitney Aircraft Corporation made possible the production of goods for interstate commerce. The surveyors were covered because they were working upon and reconstructing instrumentalities of interstate commerce.

The fact that petitioners were engaged in new construction was incidental. They were covered by the Act because of the specific nature of their individual duties.

I.

Petitioners firemen and guards were covered by the Fair Labor Standards Act because the protective nature of their duties were so closely related to incoming interstate shipments as to be a part thereof.

As heretofore stated, the firemen were on guard to protect boxcars and their contents (366), the lumber yards (365), warehouses (378) power transformers (477), power

houses (477) and incoming interstate shipments (521) stored in boxcars before they were unloaded (366).

The activities of the guards were substantially the same, and they protected the area, including freight cars (551), unloaded freight (551), goods stored in warehouses (551), transformers, etc., against sabotage and theivery (520).

Practically all of the materials used in the construction of these buildings and which came in over the railroad sidings, came from outside the state of Missouri (521). The goods in unloaded cars, goods in the process of being unloaded, and goods still in moving trucks and box cars were still on the interstate journey. In this connection, we call the Court's attention that large percentages of incoming interstate shipments were in the process of being unloaded or still loaded in boxcars (368-369-467-527). The firemen and guards who protected these shipments were so directly and closely related to interstate operations as to be a part thereof. Without their protective services these goods in interstate commerce would have been subjected to the hazards of fire and thieves.

It is not necessary for an employee to actually handle goods to be engaged in interstate commerce. In *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, the court passed upon the claims of "white collar workers," such as draftsmen and timekeepers who drew the plans and kept the time on a project involving construction of facilities directly connected with commerce. The Court said, l. c. 337:

> "(4) The dredging contractors paid time and a half for overtime to all its employees engaged in constructing the channels, berths, retaining walls, and pier, except the appellants and six others. The dis-

tinction seems to be made on the theory that they were so-called 'white collar' workers. * * * Three were timekeepers engaged in keeping the time of all who worked on the project. *In our opinion they were as much engaged in the construction of the channels inward from Puget Sound and the retaining walls and dredging installations on the pier to keep open the channels and berths as were the men dredging the channels and berths, the cement men working on the retaining walls and the mechanics installing the permanent dredging apparatus on the pier—all pursuant to the draftsmen's plans and the time kept by the timekeepers. Since such work is in commerce, the men so actually engaged in it are in commerce and entitled to time and a half pay for their admitted overtime work.* They have the immediacy of participancy lacking in the case of *McLeod* v. *Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, cited in *Armour & Co.* v. *Wantock*, 323 U. S. 126, 131, 65 S. Ct. 165, 167, 89 L. Ed. 118" (Italics ours).

The latest Federal case which has come to our attention is from the Fifth Circuit, *Russell Co., Inc.*, v. *McComb*, 187 F. 2d 524. In this case the appellant operated a wholesale grocery business in Mississippi, wherein it purchased and packed merchandise for sale, largely in the State of Mississippi. A small percentage of the merchandise was shipped out of the state. A night watchman was employed to guard the premises, including the warehouse building and the area in which freight motor trucks were parked and where merchandise was loaded into railroad freight cars standing on the spur tracks of appellant's property. His duty, as was the duty of the guards and firemen in the instant case, was to guard against fire, theft or any other damage to any of the buildings or merchandise. The Court held that the watchman was not only engaged in the production of goods for commerce but was engaged in commerce. On the question of "engaged in commerce" the Court said, l. c. 526:

"We are of opinion the trial court correctly held that appellant's night watchman is engaged in commerce and in the production of goods for commerce in such degree as to come within the scope of the Fair Labor Standards Act. *The holding that the watchman's activities 'contribute so materially and directly to the flow of goods in commerce "as to be in practice and in legal contemplation a part of it"' is in accord with the prevailing authorities. Overstreet* v. *North Shore Corp.*, 318 U. S. 125 (6 Labor Cases, para. 51,155); Cf. *McLeod* v. *Threlkeld*, 319 U. S. 491 (7 Labor Cases, para. 51,162)" (Italics ours).

To the same effect, see *Tagler et al.* v. *F. D. Carpenter Coal Co.*, 57 Fed. Supp. 314, *West Kentucky Coal Co.* v. *Walling* (6 C. C. A.), 153 F. 2d 582. Both of these cases held that guards in coal yards protecting incoming interstate shipments of coal were covered by the Act.

II.

After preparations for Pratt & Whitney operations started, fireman and guards, while still under the protection of the Fair Labor Standards Act because their protective activities were so closely related to incoming interstate shipments as to be a part thereof, were covered for an additional reason. From the time the manufacturing started, they were covered because their work was necessary and essential to the actual production of goods for commerce. The waterboys were covered for the same reason.

The firemen and guards protected the area for Pratt & Whitney in the same way that they did for respondents Long-Turner (460-461-483-484-528-544). The waterboys furnished water for Pratt & Whitney employees (795). The Pratt & Whitney Aircraft Corporation was engaged in the production of airplane motors to be shipped among the several states (1055) and the firemen, guards and

waterboys were performing services which were necessary to the production of the airplane engines. In other words, it would have been useless to have produced airplane engines if parts of equipment could be stolen or the operations broken up by fire.

In *Kirschbaum* v. *Walling,* 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, the employees were firemen, electricians, elevator operators, watchmen, porters, carpenters and carpenters' helpers who were performing the customary duties of persons charged with the maintenance of a building. The engineers and firemen produced heat, hot water and steam necessary to the manufacturing operation. The watchmen protected the building from fire and theft. This Court held that without the light, heat and power tenants could not engage in the production of goods for interstate commerce; that the maintenance of a safe, habitable building was indispensable to the interstate business of the tenants and that the employees were engaged in occupations necessary to the production of goods for commerce within the meaning of the Act defining "production."

In *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88, 87 L. Ed. 83, 63 S. Ct. 125, this Court held that employees of an oil drilling company who drilled the holes but who moved before the oil well was put into operation were covered by the Act.

In *E. C. Schroeder* v. *Clifton,* (10 C. C. A.) 153 F. 2d 385, l. c. 390, the Court considered the case of workers who were producing rock in constructing a dyke to prevent the flooding of an oil field and held that these workers were producing goods for commerce.

Incidentally, this case has an added importance in the case at bar, since it held that employees do not have to be employed by the person actually engaged in commerce in

order that the employees may be deemed to be producing goods for commerce.

In *Roland Electrical Company* v. *Walling,* 326 U. S. 657, 90 L. Ed. 383, 66 S. Ct. 413, Mr. Justice Burton, at 66 S. Ct. l. c. 415-16 says:

> "Putting these definitions together in their own terms Par. 6(a), as applied to the facts of this case, provides in effect that 'every employer shall pay (not less than the required minimum wages) to each of his employees who is employed in any process or occupation necessary to the production, in any state, of any part or ingredient of any articles or subjects of trade, commerce or transportation, of any character, for trade, commerce or transportation among the several states.' This does *not* require the employees to be directly 'engaged in commerce' among the several states. This does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several states. This does *not* require an employee to be employed exclusively in the specified occupation.
>
> This does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration. It is enough that his occupation be 'necessary to the production.' There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production" (Italics the court's).

In *Russell Co., Inc.*, v. *McComb, supra,* in holding that the night watchman was engaged not only in commerce but in the production of goods for commerce, the Court said, l. c. 526:

"In the case of *Walling* v. *Sondock*, 132 F. 2d 77, 78 (6 Labor Cases, para. 61,351), this Court, in holding that night watchmen who guarded and protected interstate distribution transactions were 'engaged in commerce,' stated the applicable rule thus:

> '* * * if the work of the employee has such close and immediate connection with the process of production for commerce as to be an essential part of it, such employee is engaged in the production of goods for commerce within the meaning of the Act. Similarly, if an employee's services are part of and contribute materially to the consummation of transactions in interstate commerce, the employee is engaged in commerce as defined by the Act.' See also *Slover* v. *Wathen*, 140 F. 2d 258 (7 Labor Cases, Para. 61,935); *Engebretsen* v. *E. J. Albrecht*, 150 F. 2d 602 (10 Labor Cases, Para. 62,706)."

We submit that in the words of Mr. Justice Burton, the firemen, guards and waterboys were employed "in an occupation which is necessary to the production of a part of any other 'articles' * * * which are produced for trade, commerce or transportation among the several states."

III.

The surveyors were covered because when they were working upon the sidings connected with the railroad tracks, they were working upon instrumentalities of interstate commerce.

The surveyors surveyed and repaired the sidings which were brought in from the main line of the Missouri Pacific tracks (263-267). They staked out and laid the turns and fills for the main spur line within the plant (267). It was necessary to re-lay these spurs many times (271-272). It was admitted that the main line of the Missouri Pacific extended outside the State of Missouri (275). As soon as

the temporary track was laid, cars began to come in over the siding (303-304) and over the same track tractors, bulldozers and other equipment were shipped outside (326). The work on the switch tracks started approximately 30 days after August 3, which would be approximately September 2 or 3, 1942 (272). After that time, the larger or substantial portion of the time worked by these employees during each and every work week was devoted to work on these instrumentalities of interstate commerce (278-79, 314, 333).

In *Walling* v. *Patton-Tulley Transportation Co.*, (6 C. C. A.) 134 F. 2d 945, l. c. 946 and 947, the Court in our opinion, properly stated the law, l. c. 946-7:

> "(1) Long before the expanded concept of interstate commerce, as we now understand it, began to develop, we pointed out in *Baltimore & Ohio R. R. Co.* v. *Hooven*, (6 Cir.) 297 Fed. 919, 922, that in actions under the Federal Employers' Liability Act, 45 U. S. C. A., paragraph 51, *et seq.*, the statutory test was whether the employee of the interstate carrier is himself engaged in interstate commerce, *and that he is deemed to be so employed if he is working upon an instrumentality of interstate commerce.* * * *
>
> "Consistently have we held to this line of authority, including within the ambit of interstate commerce thus defined, not only employees working on tracks and roadways directly employed by interstate railroads, *but likewise those employed by a construction company* engaged in such activities, *Erie R. R. Co.* v. *Margue*, (6 Cir.) 23 F. 2d 664; employees not directly engaged in train movements unless the instrumentalities have been withdrawn from service, *Law* v. *Illinois Central R. R. Co.*, (6 Cir.) 208 Fed. 869, and bridge carpenters painting bridges over which interstate trains travel, *Norfolk & Western R. R.* v. *Trautwein*, (6 Cir.) 111 F. 2d 923, to mention but a few of the adjudications (Italics ours)."

In *Walling* v. *McCrady Construction Co.*, (3 C. C. A.) 156 F. 2d 932 (certiorari denied), the court held that employees who were engaged in the removal of an old railroad bridge and partial building of a new, repairing a roundhouse, putting in foundations for a new signal tower and sub-flooring for a new maintenance building and storehouse were within the Act.

In *Wage and Hour Interpretative Bulletin No. 5*, November, 1939, C. C. H. Labor Law Reporter, Vol. III, page 21435, the administrator said:

> "(13) Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act. And employees of contractors who are employed in maintaining, repairing or reconstructing buildings or machinery used to produce goods for commerce would seem to be engaged in a 'process or occupation necessary to the production' of such goods within Section 3(j) of the Act, and, therefore, within the coverage of the Act."

We fail to see how anyone could seriously argue that the surveyors were not working upon and reconstructing instrumentalities of interstate commerce, when the switch tracks upon which they worked were joined up with the Missouri Pacific and where interstate commerce flowed over the switch tracks from the time they were laid.

CONCLUSION.

The questions presented are of great public interest to those persons who are, or may in the future be entitled to protection under the Fair Labor Standards Act of 1938, as amended, particularly within the State of Missouri.

The opinions of the Supreme Court of Missouri, that court being a court of last resort, are accorded considerable weight in jurisdictions other than in the State of Missouri. Its decisions are absolutely binding upon the courts of Missouri by constitutional provisions, 1945 Constitution of Missouri, Article V, Section 2.

The opinion sought to be reviewed is in conflict with the opinions of this Court and with the opinions of the various courts of appeal, and for that reason we submit that this Court's writ of certiorari should issue in order that the first pronouncement of the Supreme Court of Missouri construing this remedial legislation may be corrected.

Wherefore, petitioners pray that a writ of certiorari issue to the Supreme Court of Missouri, Division No. 2, commanding said Court to certify its record and send to this Court a full and complete transcript of the record and of the proceedings of said court in the case numbered and entitled "40983, John F. Hartmaier *et al.*, appellants, v. John C. Long *et al.*, respondents," and that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and your petitioners pray that the certified copy of the record and the proceedings of said court filed with this petition, may be treated as a return to said writ of certiorari, and your petitioners pray that they may have such other and further remedies

in the premises as to the Court may seem appropriate and in conformity with the law.

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